In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-33 and 71-34

ILARIO ZANNINO, PETER LIMONE, LEWIS M. STRAUSS AND JOSEPH P. BALLIRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Massachusetts, petitioners [1] Strauss and Balliro were convicted of transporting stolen goods in interstate commerce, and petitioners Zannino and Linmone were found guilty as aiders and abettors, in violation of 18 U.S.C. 2314 and 18 U.S.C. 2. They were sentenced as follows: Zannino, seven years' imprisonment and $5000 fine; Limone, seven years' imprisonment (to be served concurrently with a state sentence); Balliro, five years' imprisonment and $5000 fine; Strauss, three years' imprison-

[1] Petitioners Zannino and Limone have filed a joint petition in No. 71-33, and petitioners Strauss and Balliro have done the same in No. 71-34. Essentially identical contentions are made in both petitions. "Pet." and "Pet. App." refer to No. 71-33.

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ment. The court of appeals affirmed in a comprehensive opinion (Pet. App. 24–34).

The evidence showed that on March 24, 1966, Erwin Soroko and Charles Lombardi robbed a Boston, Massachusetts, jewelry firm of about $146,000 in jewelry (R. 8–9, 46–47, 54–59).[2] They drove to a summer cottage in Northwood, New Hampshire, where the jewelry was hidden, and then returned to Boston (R. 10–12, 780, 784).

Soroko asked petitioner Balliro to arrange a sale of the stolen jewelry, and after one unsuccessful attempt, Balliro arranged a meeting for Soroko with petitioners Zannino and Limone. The meeting occurred in Boston at the Intermission Lounge, which Balliro owned, on the afternoon of April 7, 1966. Zannino said he would arrange to have his appraiser (petitioner Strauss) examine the jewelry (R. 25–28).

The next day Soroko, Balliro and Strauss drove to the cottage in New Hampshire, where the parties examined the jewelry and agreed on a price of $60,000. Soroko gave the jewelry to Strauss and the three men returned to Boston (R. 29–36). Later that afternoon, Zannino and Limone met again with Soroko and Balliro at the latter's lounge and made arrangements for the payment (R. 37–40). Soroko subsequently received the $60,000 from Zannino and Limone in two payments (R. 40–45, 803–806, 811–815).

1. Petitioners contend that knowledge that a state line is being crossed is an essential element of the offense of interstate transportation of stolen property

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[2] "R." refers to the record appendix in the court of appeals, a copy of which is being filed with the Clerk.

with respect to both the principal actors (Strauss and Balliro) and the aiders and abettors (Zannino and Limone), and that there was no proof that they had such knowledge.

a. Strauss and Balliro claim that even though they physically transported the stolen jewelry across the state line, there was no proof that they knew they were traveling interstate. The court of appeals correctly pointed out, however, that "the statute [18 U.S.C. 2314] makes clear that the only knowledge required is that stolen goods are being transported," and concluded that actual knowledge of interstate travel was not necessary (Pet. App. 27). See *United States* v. *Kierschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2) certiorari denied, 338 U.S. 815.

b. Zannino and Limone contend that the interstate travel by Strauss and Balliro was not reasonably foreseeable and that therefore they could not be liable as aiders and abettors under 18 U.S.C. 2. As the court of appeals noted (Pet. App. 27–28), the aider and abettor stands in the shoes of the principal actor; Zannino and Limone are responsible for the acts of their agents, Strauss and Balliro, in crossing a state line, since those acts plainly were within the scope of the criminal agency. See *Pereira* v. *United States*, 347 U.S. 1, 11; *Nye & Nissen* v. *United States*, 336 U.S. 613, 620.

Petitioners cite *Rewis* v. *United States*, 401 U.S. 808, for the proposition that the government must prove "reasonable foreseeability" for criminal liability under 18 U.S.C. 2. This argument fails because

there is an important distinction between 18 U.S.C. 2(a), a standard provision on aiders and abettors under which petitioners were found guilty, and 18 U.S.C. 2(b), which prohibits one person from willfully causing another to do an act that would be unlawful if performed by the first person. 18 U.S.C. 2(b) was involved in *Rewis*. As that case went to the jury, all interstate contacts and travel were initiated by the patrons of a small betting establishment. This Court found that interstate travel "by mere customers" did not violate the statute there involved (18 U.S.C. 1952), and held that the proprietors of the establishment, who themselves were not shown to have travelled interstate or used interstate facilities, could not be convicted on the basis that the interstate contacts and travel by their patrons were foreseeable (401 U.S. at 811–813). Although the *Rewis* opinion does not explicitly make the point, the proprietors' criminal liability could not have been based on the aider and abettor provisions of 18 U.S.C. 2(a), under which Zannino and Limone were convicted, since the activity of the principals, the patrons, did not violate federal law; rather the proprietors' liability would have been based only on 18 U.S.C. 2(b), for willfully causing an act to be done (the interstate travel by their patrons) which would be illegal if directly performed by them. We agree with petitioners, as we urged to the Court in *Rewis* (see 401 U.S. at 813), that foreseeability of result is an essential element under Section 2(b). But there is no like requirement under Section 2(a), and there is no suggestion in *Rewis* casting doubt upon traditional

doctrines of liability for those who aid and abet, under which petitioners are guilty.

2. Petitioners claim that their motion for a new trial should have been granted because their newly discovered evidence flatly contradicted that of the key government witness, Soroko. Petitioners Mannino and Limone also contend that they were denied due process of law because two years of their seven year sentences were particularly ascribed by the sentencing judge to their reputations for being involved in organized crime, as reflected in unrebutted testimony before Senate committees. These contentions were fully answered in the opinion of the court of appeals (Pet. App. 28–32), on which we rely here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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